No. 110

In the Supreme Court of the United States

OCTOBER TERM, 1948

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JACKSONVILLE PAPER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the district court (2nd R. 992–1011)[1] is reported at 69 F. Supp. 599. The opinion of the court of appeals (2nd R. 1121) is reported at 167 F. 2d 448.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1948 (2nd R. 1125). The petition for

[1] The record in the original injunction proceeding (No. 336, October Term, 1942) will be cited as "1st R"; the proceedings in the district court immediately following this Court's remand of the case will be cited as "2nd R"; the record in the present contempt proceeding will be cited as "2nd R."

a writ of certiorari was filed on June 21, 1948 and was granted on October 11, 1948. The jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, now Section 1254 (1) of new 28 U. S. C.

QUESTIONS PRESENTED

1. Whether in a civil contempt action proof of wilful or intentional defiance of the decree is required where compliance is the sole remedy sought, and no penalty or punishment is involved.

2. Whether a judgment enjoining underpayments in violation of the minimum wage and overtime provisions of the Fair Labor Standards Act is unenforceable in a civil contempt action because the trial court did not specifically condemn or refer to the particular unlawful practices resulting in the underpayments proved in the contempt proceeding.

3. Whether in a civil contempt action, upon proof of underpayments in violation of a decree, the Administrator is entitled to an order compelling compliance with the decree by the payment of the wages required thereby.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 7 (a). No employer shall, except as otherwise provided in this section, employ

any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) For a workweek longer than forty hours * * *, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 15. (a). After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

* * * * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

STATEMENT

This proceeding in civil contempt arises out of the same case which was before this Court over

five years ago *sub nom. Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564. The question before this Court at that time was whether the Fair Labor Standards Act applied to respondents' employees in certain of respondents' branch warehouses. Employees in respondent's principal plant and in other warehouses were concededly covered, and an injunction had been issued against respondents as to them. This Court's decision slightly enlarged the class of employees covered. The question here is whether respondents, who according to the finding of the court below have continued to violate the law, should be required in a civil contempt proceeding to comply with the original injunction by paying their employees the amounts which have unlawfully been withheld from them since the original injunction was entered.

A. PROCEEDINGS PRIOR TO ISSUANCE OF INJUNCTION

This action was originally instituted in July 1940 to enjoin respondents from violating the minimum wage, overtime, record-keeping, and "hot goods" provisions of the Fair Labor Standards Act (1st R. 2–21).

At a pre-trial conference, respondents admitted that they were engaged in interstate commerce at the principal office and warehouse in Jacksonville, Florida, and at five of the twelve branches (1st R. 37). They claimed that the other seven

branches were engaged exclusively in intrastate commerce (1st R. 38). As to these seven branches respondents admitted that there was no compliance with the Act inasmuch as they did not believe the Act covered the activities there carried on (1st R. 43, 38). At the beginning of the trial, counsel for respondents also admitted that there had been violations, without specifying particulars, at the other admittedly covered offices and branches of their business, but claimed that such violations ceased by April 27, 1940, or a few weeks before suit was filed (1st R. 44–47).

At the trial, the Administrator introduced evidence to establish that respondents were violating the minimum wage and overtime provisions of the Act in various ways at the admittedly covered plants as well as at the so-called "intrastate" branches. The proof that had been presented with respect to violations up to the time of the trial court's determination that the issuance of an injunction was warranted (see pp. 7–8, *infra*) showed the following:

(1) *Piece-workers.*—Respondents had failed to comply with either the minimum wage or the overtime provisions of the Act as to piece-workers, respondents' managing partner taking the position that piece-workers were not covered. This treatment of piece-workers had continued despite the contrary advice of the Wage and Hour inspector, and apparently despite the ad-

vice to respondents from their own attorney that piece rate workers were within the scope of the Act. (1st R. 185–187, 576, 577.)

(2) *Concealment of overtime hours* by crediting such time to other workers who had not worked the maximum workweek. Under this system, the employees who worked the overtime collected at the straight-time rates from the other employees for the hours credited to the employees who had not worked them (1st R. 182–184, 196).

(3) *Keeping a separate account* and paying employees separately, on so-called "extra labor vouchers," for hours worked in excess of the maximum workweek and not showing such overtime hours on the regular time book (1st R. 189–192, 200–206, 211–212).

(4) *Misclassifying* certain salaried employees as exempt "executive" and "administrative" employees (1st R. 82–103, 120–128, 194). The evidence of the Wage and Hour inspector shows that officials of the Southern Industries plant were advised that they appeared to be misclassifying certain salaried employees who did not meet the requirements of the regulations issued by the Administrator pursuant to the Act. The inspector offered to furnish defendant C. G. McGehee a copy of the regulation and to explain it, but Mr. McGehee turned down the offer with the statement that he was sufficiently familiar with the regulation (1st R. 194).

(5) *The accumulated hours plan.*—Shortly before the institution of this suit in 1940, respondents "through a wholesale firing of all employees on Saturday, April 27, 1940 and a wholesale rehiring of the same employees on Monday, April 29, 1940" (2d R. 998–999) inaugurated a plan by which these employees received the same compensation as before, purportedly arranged so as to cover both straight time and overtime (2nd R. 111–139; 1st R. 315–335, 543–558). Although respondents believed the plan lawful under *Walling* v. *Belo Corp.*, 316 U. S. 624 (2nd R. 1000), the court in the contempt proceeding [2] found it illegal because it set up "a completely false and fictitious method of computing compensation without regard to the hours actually worked" (2nd R. 1001), a finding from which respondents have not appealed.

(6) *Section 11 (c) violations (record-keeping violations).*—In addition to respondents' failure to keep any records of the hours of the piece-rate workers (1st R. 182, 197–198), false records were kept with respect to employees whose overtime hours were credited to other employees and

[2] The plan is described in more detail in the findings of the district court at the contempt trial (2nd R. 999–1001). Extensive testimony as to this practice was presented by both parties at the original trial, both before and after the court shut off evidence as to violations generally (1st R. 315–335; 543–558); the record in the contempt proceeding incorporated a portion of the original record with respect to the plan (2nd R. 111–139).

employees who were paid by "extra labor vouchers" pursuant to the practices described *supra*.

After hearing the Government's evidence on these matters for almost three days (1st R. 39–335), the trial court stated that it appeared from the admissions as to violations and from the evidence that respondents "have not heretofore complied with the Act" (1st R. 335); the court thereupon directed that further evidence relate to the question whether some of respondents' branches were covered by the Act (1st R. 335–336).[3] At the close of the trial the court held that the employees at the seven disputed branches were not subject to the Act, but concluded from respondents' admissions of violations at the branches concededly in interstate commerce that the statute had been violated and that an injunction should issue as to those branches (1st R. 707–708). The court made no findings as to particular practices at those branches, inasmuch as it had shut off the evidence as to such matters (1st R. 711). An injunction was entered limited to the other establishments, generally restraining violations of *any* of the provisions of the Act and particularly Sections 6 (minimum wage), 7 (overtime), 15 (a) (1) (shipment of "hot goods"), and 11 (c) (record-keeping) (1st R. 712–718).

[3] Additional evidence with respect to violation was, however, heard (1st R. 543–558).

Both parties appealed to the circuit court of appeals. That court held that some of respondents' employees at the disputed warehouses were engaged in interstate commerce, and that the Administrator was therefore entitled to relief as to them (1st R. 743–745). In addition, the appellate court eliminated from the injunction as too broad the general prohibition against "violating *any* of the provisions" of the Act (1st R. 745). The cause was therefore ordered remanded for the framing of a new decree. On writ of certiorari, this Court held that the activities of some additional employees at the disputed warehouses were in commerce, and affirmed the judgment of the circuit court of appeals as thus modified, stating that "Whether additional evidence must be taken on any phase of the case so that a decree may be drawn is a question for the District Court." 317 U. S. 564, at 572.

Pursuant to the mandate of this Court and the judgment of the circuit court of appeals, the district court without further hearing (2nd R. 994) entered an amended and modified judgment, June 3, 1943 (2nd R. 1111–1119). The amended judgment omitted the general injunction against violating *any* of the provisions of the Act. The judgment specifically enjoined respondents, *inter alia*, from paying employees covered by the Act [4]

[4] The judgment contained specific provisions as to which employees were covered by the Act (2nd R. 1111–1119).

"less than thirty (30¢) cents an hour, or, after October 23, 1945 * * * less than forty cents (40¢) an hour", except as permitted by orders of the Administrator issued under Section 8 or 14 of the Act, and from employing such employees "for a workweek longer than forty (40) hours unless such employee receives compensation for his employment in excess of forty (40) hours in such workweek at a rate not less than one and one-half times the regular rate at which he is employed". (Supp. R. 4-5, 7, 10-11.) No appeal was taken from this judgment.

B. PROCEEDINGS IN THE CONTEMPT ACTION

This civil contempt proceeding was instituted by the Administrator in April 1946. The application for an adjudication in civil contempt alleged that respondents had not been complying with the minimum wage, overtime, and record-keeping provisions of the judgment in many respects (2nd R. 1–15). The application prayed that respondents be required to terminate their continuing violations and to "make payment of the amounts of unpaid wages due their affected employees" (2nd R. 14). After trial, the district court found widespread violations of the Act by respondents (1) by misclassifying some twenty employees as exempt "executive" or "administrative" employees, (2) by employing certain piece

workers in excess of the maximum workweek without paying them overtime compensation, (3) by excluding from the regular rate of pay of virtually all employees a wage increase granted in the guise of a so-called "bonus," and (4) by applying to numerous employees a "completely false and fictitious method of computing compensation" in the form of an "accumulated hours plan" (2nd R. 998–1008).[5] Except for the third, these violations were of the same nature, and in some instances concerned the same employees, as were the subject of the trial in the original injunction proceeding (1st R. 82–95, 120–128; 2nd R. 241–259, 267–286).

The district court nevertheless held that because the prior judgment did not specifically adjudicate the invalidity of the above practices, the court lacked "discretionary power" to punish the defendants for contempt, inasmuch as "to constitute civil contempt there must be some evidence of a wilfull and intentional violation of a Court Order" (2d R. 1010). The finding of absence of wilfullness was seemingly predicated on the conclusion that none of the "specific provisions of

[5] The court of appeals stated in its opinion that the decree was "in general complied with" (2nd R. 1124). In view of the proof and findings of widespread violations of the sections of the Act referred to in the decree, the import of this statement is not clear. There was no such finding by the trial court nor does the record support such a finding.

the former Judgments prohibiting the doing of any specific thing" had been violated (2d R. 1010–1011).[6] The court further held that it had no power under the statute to allow the administrator to enforce the payment of the unpaid statutory wages in order to enforce compliance with the former judgments, relying on the prior decision of the Fifth Circuit in *Walling* v. *Crane*, 158 F. 2d 80.

The court thereupon treated the application for an adjudicaton in contempt as an amended complaint seeking a broadening of the previous injunction, and entered judgment issuing such an injunction (2d R. 1011–1016).

Both parties appealed.[7] The circuit court of appeals affirmed both the ruling that respondents had violated the Act and the refusal to adjudicate respondents in civil contempt (2d R. 1121–1125), stating that the trial court was justified in the "conclusion that there was no wilful evasion of the law or the injunctions, since they did not specifically refer to or condemn" the particular

[6] With respect to the accumulated hours plan the court found (2nd R. 1000) that respondents thought their action lawful under *Walling* v. *Belo Corp.*, 316 U. S. 624. The court made no similar finding as to respondents' beliefs with respect to any of the other practices in issue.

[7] Respondents did not challenge the findings that its "accumulated hours plan" was invalid nor that three of its employees had been misclassified as "executives," but did appeal from the other findings of violation.

unlawful practices proved in the contempt proceeding (*Id.* at 1124).*

SUMMARY OF ARGUMENT

I

It is well established that an adjudication in civil contempt does not depend upon proof of willful or intentional defiance of a decree where compliance is the sole remedy sought. Whether respondents meant to violate the injunction or not, they calculatingly risked crossing the line of illegality when they engaged in the same practices which the Administrator charged were unlawful at the original trial. Civil liability for damage thus done does not depend upon whether respondent had a guilty mind. In civil contempt to obtain the benefits of a decree, and not punishment or penalties of any kind, the belief, motive, or intent of the defendant not to violate the injunction does not excuse him if in fact his acts resulted in a violation of it.

The refusal of the courts below to enforce the terms of the decree in the instant case is par-

* The court ruled that there was "no need to enquire whether, if there had been [contempt] the court could award reparation for unpaid wages as a purging of the contempt," but it granted leave to the Administrator to apply to the district court to seek "retroactive reparation" as an "incident" of the broadened injunction (2nd R. 1125). But cf. the same court's decision in *Walling* v. *Crane*, 158 F. 2d 80, discussed *infra*, pp. 41, 52, 53.

ticularly without justification, since it excused not only practices of possibly doubtful illegality, but also practices unquestionably illegal and which respondents knew were claimed to be illegal by the Government when the injunction was issued. In any event, whatever reason there might be for reluctance to *punish* or *penalize* for unintended violations resulting from an erroneous interpretation of the decree, there is no equitable basis for relieving defendant of the purely civil obligation to bring himself into compliance with the terms of the decree and of the law, and to disgorge the benefits accruing to him by reason of his resolving doubts against compliance.

II

The judgment enjoining underpayments in violation of the minimum wage and overtime provisions of the Act was sufficiently definite for enforcement in a civil contempt action even though the particular practices proved in the contempt proceeding were not specifically condemned in the judgment. The judgment in terms clearly and specifically directs the respondents to pay the statutory minimum wages and overtime compensation. Respondents did not appeal from this judgment nor seek to have it modified prior to this contempt proceeding. In refusing to enforce the decree according to its terms, the decision below conflicts with this Court's decisions re-

affirming "the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of an order alleged to have been disobeyed * * *." *Maggio* v. *Zeitz*, 333 U. S. 56, 68–69; *Swift & Co.* v. *United States*, 276 U. S. 311, 327–328; see also *United States* v. *United Mine Workers*, 330 U. S. 258, 293.

The propriety and practical necessity in the instant case, of enjoining underpayments without limitation to particular practices resulting in underpayment is sustained both by the restricted nature of the statutory requirement and by the character and extent of respondent's past unlawful conduct. Although the injunction is in substantially the language of the pertinent sections of the Act, the statutory requirements are in themselves sufficiently definite. As a matter of fact three of the four violations found in the contempt proceeding were not merely "similar or fairly related to" respondents' prior unlawful conduct (cf. *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426, 435); they were exactly the same sort of illegal practices as had been charged at the original trial. In cases in which the sweeping nature of the violations warrants the issuance of a relatively broad injunction to prevent future violations in a related though somewhat different form, this Court has repeatedly recognized the propriety of injunctions not limited to precise acts found to have been unlawful. The present

case clearly comes within this class. A decree limited to underpayments resulting from specific practices would be largely ineffectual because of respondents' demonstrated proclivity for violation and the comparative ease with which a recalcitrant employer can shift from one device to another for avoiding the statutory requirements.

III

Effective remedial relief in a civil contempt action for underpayments in violation of the decree requires that the contemnor be ordered to purge the contempt by restoration of the underpayments. The reasoning of *Porter* v. *Warner Holding Co.*, 328 U. S. 395, holding that the Price Control Administrator's authority to bring enforcement proceedings in equity includes the power to compel restitution of overcharges to customers, appears applicable as well to the Fair Labor Standards Act. But whether or not in an original proceeding the Administrator is entitled to seek restitution of wages previously withheld, clearly after issuance of an injunction a court of equity may and should order restitution of subsequent underpayments in violation of the injunction. Such a restoration order is the usual remedy characteristic of civil contempt, and is a necessary part of "the full remedial relief" to which the Government, like other suitors, is entitled to compel compliance with a judgment in a civil contempt action. Any

relief less than reparation of the underpayments, far from compelling compliance, puts a premium on violation of the injunction and by permitting the contemnor to retain the fruits of his violations encourages "experimentation with disobedience."

The suggestion of the court below that such a restitution order might conflict with the employees' right to recover under Section 16 (b) of the Act is without foundation. Although employees have a private right to their wages and to be made whole by way of liquidated damages for underpayments, the Administrator has an independent interest—on behalf of the public—in compelling the payment of the statutory wages. The two remedies are distinct and supplementary; they are not irreconcilable. *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398, 402, n. 5; *Bowles* v. *Skaggs*, 151 F. 2d 817, 821 (C. C. A. 6); *Creedon* v. *Randolph*, 165 F. 2d 918, 919–920 (C. C. A. 5).

Nor is there any basis for the apparent assumption by the courts below that a restitution order represents punishment or a penalty. Such an order is designed merely to accomplish a basic function of civil contempt—"to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." See *United Mine Workers* opinion, 330 U. S. at 300, 303–304; *Penfield Co.* v. *Securities and Exchange Commission*, 330 U. S. 585, 594.

ARGUMENT

I

THE COURTS BELOW ERRED IN RULING THAT PROOF OF WILFUL OR INTENTIONAL DEFIANCE OF THE DECREE IS REQUIRED FOR AN ADJUDICATION IN CIVIL CONTEMPT WHERE COMPLIANCE IS THE SOLE REMEDY SOUGHT

The courts below have not denied that respondents were violating the injunction issued after the decision of this court in 1943. They held, however, that respondents' conduct could nevertheless not be found in contempt because the violations were not "wilful". This apparently meant that since the unlawful practices committed were not referred to specifically in the judgment and had not been explicitly held unlawful by the enjoining court, respondents (though doubtless intending what they were doing) were not aware that such conduct was covered by the injunction.

For present purposes, we shall assume the correctness of the lower courts' finding that respondents' unlawful conduct was not a "wilful" violation of the injunction. Since respondents knew that they were engaging in precisely the same practices charged by the Administrator to be unlawful at the first trial and that the injunction was in the language of the statute, it is clear, however, that respondents calculatingly

risked crossing the line of illegality, whether they meant to violate the injunction or not.

The holding that proof of wilful or intentional defiance of a decree is required in a civil contempt action in order to secure simply the remedy of compliance—without any punishment—conflicts with the general rule consistently recognized in the circuit courts of appeals and the district courts and by leading secondary authorities. *Telling* v. *Bellows-Claude Neon Co.*, 77 F. 2d 584, 586 (C. C. A. 6), certiorari denied, 296 U. S. 594; *Proudfit Loose Leaf Co.* v. *Kalamazoo Loose Leaf B. Co.*, 230 Fed. 120, 132 (C. C. A. 6); *Lustgarten* v. *Felt & Tarrant Mfg. Co.*, 92 F. 2d 277, 280 (C. C. A. 3); *Labor Board* v. *Whittier Mills Co.*, 123 F. 2d 725, 727 (C. C. A. 5); *Metallizing Engineering Co.* v. *B. Simon*, 64 F. Supp. 848 (W. D. N. Y.); *Bowers* v. *Pacific Coast Dredging & Reclamation Co.*, 99 Fed. 745, 755 (C. C. N. D. Calif.); *Atlantic Giant Powder Co.* v. *Dittmar Powder Manufacturing Co.*, 9 Fed. 316 (C. C. S. D. N. Y.); *Freeman* v. *Premier Mach. Co.*, 25 F. Supp. 927, 928 (D. Mass.); *Calculagraph Co.* v. *Wilson*, 136 Fed. 196, 199 (C. C. D. Mass.); *Matthews* v. *Spangenberg*, 15 Fed. 813, 814 (C. C. S. D. N. Y.); 2 High, *Injunctions* (4th ed., 1905) §§ 1416–20; 1 Beach, Injunctions (1895) § 250; Swayzee, *Contempt of Court in Labor Injunction Cases* (1935), pp. 20–21; Moskovitz, *Contempt of Injunctions*,

Civil and Criminal, 43 Columbia Law Review 780, 793–5 (1943), and cases cited.

These authorities uniformly recognize that wilfulness is a characteristic distinguishing criminal from civil contempt, and that while it "may affect the extent of the penalty" to be imposed for contempt, the absence of wilfulness does "not relieve from liability for a civil contempt" (see *Proudfit* case, *supra*, at 132, 134). "In civil contempt the general rule is that the defendant need not have acted wilfully, and this would seem correct, inasmuch as civil liability for damage done ought not to depend on whether or not the defendant has a 'guilty mind.'" Moskovitz, *supra*, at 794–795. Wilfulness is not a factor because one of the primary functions of civil contempt is to secure to the complainant the rights awarded by the injunction and to protect parties affected from loss or damage resulting from violation of the injunction. The purpose is remedial, not punitive, to preserve for complainant the "benefit from orders entered in its behalf" and "to compensate the complainant for losses sustained." See *United States* v. *United Mine Workers*, 330 U. S. at 302, 303–304; *Penfield Co.* v. *Securities & Exchange Comm.*, 330 U. S. at 593–594. Thus the fact that "defendants did not understand the provisions" of the decree and "did not know that it was being violated," but simply

"followed the advice of counsel and acted in good faith," should not "relieve defendant for civil contempt liability." *Metallizing Engineering Co.* v. *Simon*, 64 F. Supp. at 849.

As the Fifth Circuit itself has said, in a proceeding "in civil contempt to obtain the benefits of a decree and not one in criminal contempt to hold the respondents guilty of a crime, * * * the question for decision is not one of the intent with which, but simply whether, certain acts were done." *Whittier Mills Co.* case, *supra*, at 727. And in *United States* v. *United Mine Workers*, 330 U. S. 258, this Court recently indicated that willfulness was not an element of civil contempt, saying "The charge in the petition of 'wilfully * * * and deliberately' disobeying the restraining order indicates an intention to prosecute criminal contempt" (330 U. S. at 297n).

The courts below apparently regarded the proceeding as punitive in nature and failed to recognize that the only sanction sought by the Administrator is the "usual remedy" characteristic of civil contempt, designed not to punish but only to accomplish a basic "function of civil contempt"—"to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." See *United Mine Workers* opinion, 330 U. S. at 300, 303–304; *Maggio* v. *Zeitz*, 333 U. S. 56 at 68. Where, as

in the instant proceeding, no penalty or punishment of any kind is sought, but only the strictly civil relief of compliance with a duty imposed by the decree and by the law, "the belief, motive, or intent of the defendant not to violate the injunction does not excuse him if in fact his acts resulted in a violation of it. The breach of the injunction consists in doing the forbidden thing, and not in the intention with which it is done." See *Rodgers* v. *Pitt,* 89 Fed. 424, 429 (C. C. D. Nev.).

The blanket refusal by the courts below to enforce the terms of the decree in the instant case is particularly without justification, since it excused not only practices of possibly doubtful illegality but also practices unquestionably illegal and which (with the possible exception of the bonus plan) respondents knew were claimed to be illegal by the Government *when the injunction was originally issued.* There could not have been any reasonable doubt, for example, about the applicability of the Act to piece workers after this Court's decision in January 1945 in *United States* v. *Rosenwasser,* 323 U. S. 360. Yet the record in the contempt proceeding shows that respondents were still underpaying piece workers and asserting that they were not within the scope of the Act a year and half after that decision (2nd R. 1007–1008; 244–246, 252, 254–256). Likewise,

the findings of the district court (2nd R. 1005–6) show that there was no reasonable ground for respondents to have misclassified their employees as "executives." The evidence that these employees did not meet the prescribed standards to qualify for the exemption was found by the district court to be "so conclusive" as to make it "unnecessary for the Court to summarize the reason for the disqualification of each particular employee" (2nd R. 1006). Similarly, the characterization by the district court of the "accumulated hours plan" as a "completely false and fictitious method of computing compensation without regard to the hours actually worked" (2nd R. 1001), would seem to foreclose the conclusion that there was reasonable doubt as to the illegality of that scheme, particularly after subsequent decisions of this Court.[9] Thus, with the possible exception of the bonus plan, it cannot fairly be said of any of the illegal practices proved in the contempt proceedings that there was reasonable uncertainty of their illegality.

In any event, whatever reason there might be for reluctance to punish or penalize respondents

[9] The decisions in the *Helmerich & Payne, Harnischfeger and Youngerman-Reynolds* cases, decided November 6, 1944, and June 4, 1945, respectively, made it plain that any false or fictitious or artificial method of computation was invalid. *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419.

for unintended violations resulting from an erroneous interpretaton of the decree, there is no equitable basis for permitting respondents to breach the injunction without even the risk of having to relinquish to the wronged employees the fruits of their violations. As suggested some years ago by the Seventh Circuit Court of Appeals in a patent infringement case, a defendant who has been enjoined has no "equity" to hew close to the line of disobedience and avoid a citation for contempt when he oversteps the line. *Charles E. Hires Co.* v. *Consumers' Co.*, 100 Fed. 809, 813 (C. C. A. 7); see also *Williams* v. *Mitchell*, 106 Fed. 168, 172 (C. C. A. 7). It has long been recognized that "any person who has been enjoined, who undertakes to see how far he can go or what he may do without crossing the prohibited line, places himself in a dangerous condition, and is always liable to be deemed guilty of contempt; for his own judgment may be so warped by his feelings or necessities that he is liable, even unintentionally, to overstep the legal bounds" (*Rodgers* v. *Pitt*, 89 Fed. 424, 429 (C. C. D. Nev.)). "It is not proper for a defendant who has been enjoined to experiment with a view of determining how near he may come to a violation of the injunctions without actually violating it." 2 High, *Injunctions*, § 1427.

As this Court has pointed out, even criminal penalties may be incurred through such "uninten-

tional" illegal conduct. See *Horning* v. *District of Columbia*, 254 U. S. 135, 137, where Mr. Justice Holmes, speaking for the Court said:

> It may be assumed that he [defendant] intended not to break the law but only to get as near to the line as he could, which he had a right to do, but if the conduct described crossed the line, the fact that he desired to keep within it will not help him. It means only that he misconceived the law.

Cf. also *United States* v. *Griffith*, 334 U. S. 100, 105–106, and *United States* v. *Paramount Pictures*, 334 U. S. 131, 173, in which this Court pointed out that proof of "specific intent" to violate the Sherman Act is not required where violation "results as the consequence of a defendant's conduct or business arrangements" (334 U. S. at 105–106, 173). Such specific intent is necessary "only where the acts fall short of the results condemned by the Act" (*id.* at 105).

There is clearly no justification for relieving a defendant of the risk of purely civil relief which requires no more than that he bring himself into compliance with the terms of a decree and of the law. The consequence of the decision below is to permit the noncomplying employer to retain the advantages accruing from his resolving doubts against compliance, at the expense not only of the public interest in effective enforcement and

of employees' rights, but also of complying competitors.

II

A JUDGMENT ENJOINING UNDERPAYMENTS IN VIOLATION OF THE MINIMUM WAGE AND OVERTIME PROVISIONS OF THE ACT SHOULD BE ENFORCED IN A CIVIL CONTEMPT ACTION EVEN THOUGH THE PARTICULAR UNLAWFUL PRACTICES PROVED IN THE CONTEMPT PROCEEDING WERE NOT SPECIFICALLY MENTIONED IN THE JUDGMENT

The refusal of the courts below to enforce the decree according to its terms was error not only (A) because it conflicts with the long-standing rule that a decree may not properly be challenged or limited short of its terms in a civil contempt proceeding, but also (B) because the decree was clearly valid and sufficiently specific in scope to forbid the particular practices resulting in the illegal underpayments proved in the contempt proceedings here.

A. THE SCOPE OF THE DECREE MAY NOT BE CHALLENGED OR LIMITED SHORT OF ITS TERMS IN A CIVIL CONTEMPT PROCEEDING

Sections 2, 3 and 6 of the judgment specifically directed respondents to pay the minimum wages and overtime compensation required by Sections 6 and 7 of the Act, and to keep the records required by Section 11 (c) of the Act and by the

Administrator's regulations issued pursuant thereto.[10]

Notwithstanding these plain directions, respondents, according to the findings of the district court, continued to underpay many of its employees contrary to the requirements of Sections 6 and 7 of the Act and did not keep the prescribed records (2nd R. 1001–9). In refusing to enforce the decree according to its terms, the decision below conflicts with this Court's decisions reaffirming "the long-standing rule that a contempt proceeding does not open to recon-

[10] These sections of the decree enjoin respondents from:

"(2) * * * paying any of their employees, engaged in commerce or in the production of goods for commerce, employed at Jacksonville, Florida, or elsewhere, wages at rates less than [the minimum amounts prescribed in Section 6 of the Act] * * * contrary to the provisions of Sections 6 and 15 (a) (2) of the Act (2nd R. 1112–13, 1114–15, 1118).

"(3) Employing any of their said employees for a workweek longer than forty (40) hours unless such employee receives compensation for his employment in excess of forty (40) hours in such workweek at a rate not less than one and one-half times the regular rate at which he is employed, contrary to the provisions of Sections 7 and 15 (a) (2) of the Act (2nd R. 1113, 1115–16, 1119).

"(6) Failing to make, keep, and preserve records of the persons employed by them and of the wages, hours and other conditions and practices of employment maintained by them as prescribed by the regulations, as amended, of the said Administrator issued pursuant to Section 11 (c) of the Act, which regulations, and amendments thereto, are known as Title 29, Chapter V, Code of Federal Regulations, part 516, or by any amendments to such regulations * * *." (2nd R. 1114, 1116–17, 1119.)

sideration the legal or factual basis of an order alleged to have been disobeyed * * *" *Maggio* v. *Zeitz*, 333 U. S. 56, 68–69; *Swift & Co.* v. *United States*, 276 U. S. 311, 327–328; see also *United States* v. *United Mine Workers*, 330 U. S. 258, 293. This aspect of the decision is also contrary to another decision of the Fifth Circuit in the case of *Labor Board* v. *American Mfg. Co.*, 132 F. 2d 740. In holding respondent there in contempt of a decree phrased in much broader and more general terms than the decree here involved, the court said that the contention "that the scope of the decree * * * long since become final, may now be limited *short of its terms*, is wholly without merit, for a decree entered with jurisdiction must be obeyed as entered. * * * Its terms are clear and comprehensive and if they read more broadly than respondent intended that they should, the time and manner of avoiding that breadth was by objections to the decree before its entry and not by disobedience of it afterwards" [p. 742, italics supplied].

While respondents appealed from the original decree entered in this case, they did not appeal from the decree as modified.[11] The trial court

[11] Moreover, even their appeal from the original decree did not challenge its scope, but claimed that no injunction at all should issue because of the claimed cessation of violations (1st R. 737; see also respondents' brief on that appeal, pp. 29–43).

at the injunction trial did not rule on the legality of the particular practices here involved, because it did not think such a determination necessary to the issuance of an injunction after some violations had been admitted by respondent. But the decree was drafted in terms to enjoin any such practices which were illegal. Respondents were fully aware of the scope of this decree and of the fact that some of the particular practices were claimed to be illegal. If they had "doubts as to the applicability of the injunction, they [might have] petition[ed] the court granting it for a modification or construction of the order." See *Regal Knitwear Co.* v. *Labor Board,* 324 U. S. 9, 15. They nevertheless did not appeal nor seek to have the decree modified or clarified, but chose to follow their own "private determination of the law." Cf. *United States* v. *United Mine Workers,* 330 U. S. at 293. The decision below excusing respondents' violations under such circumstances tends to "foster experimentation with disobedience" of injunctions (*Maggio* v. *Zeitz,* 333 U. S. at 69) and thus to hamper seriously the effective enforcement not only of the Fair Labor Standards Act but of many other Federal statutes which provide similar enforcement procedures.[12]

[12] See *Maggio* v. *Zeitz,* 333 U. S. at 68, n. 3.

B. THE DECREE WAS VALID IN SCOPE AND LEGITIMATELY EXTENDED TO ANY OF THE PRACTICES RESULTING IN PAYMENT OF LESS THAN THE STATUTORY MINIMUM AND OVERTIME WAGES

The decree, as modified after the first appeal of this case, enjoined violations, not of the Act generally, but only of the specific sections which previously had been violated by defendants extensively and over a substantial period of time. (See Statement, *supra*, pp. 5–8). The practices in question in the contempt proceeding were all continuing and varying means of violating the same specified sections.

Although the injunction is in substantially the language of the Fair Labor Standards Act (see pp. 2–3, 27, *supra*), the statutory requirements as to paying a specified sum per hour and time and a half for hours over forty a week are in themselves quite definite. We do not mean to suggest that there may not be some close questions and perplexing problems in computing the compensation due under the statute (see, for example, *Walling* v. *Belo Corp.*, 316 U. S. 624; *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 582–583). There is, however, not the same need for making the injunction narrower than the statutory language that there is in anti-trust cases where the statutory prohibition affects "the whole conduct of the defendants' business" (cf. *Swift* v. *United States*, 196 U. S. 375, 396), or in Labor Board cases where the statutory requirement involves a wide range of conduct of varied nature. Yet even in anti-trust and Labor Board cases this Court has sustained injunctions

substantially broader in scope than the injunction involved in the instant case, on the ground that the agency or court issuing the order "might have reasonably concluded from the evidence that such an order was necessary to prevent" further violation of the statutory provision previously violated. See *May Stores Co.* v. *Labor Board*, 326 U. S. 376 at 390; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 77; *Local 167* v. *United States*, 291 U. S. 293, 299.[13] "Injunctions in broad terms

[13] In *Labor Board* v. *Express Publishing Co.*, *supra*, although violations of one section of the Wagner Act were held insufficient to warrant a general prohibition of violations of another broad section (Section 8 (1)), this Court sustained a provision enjoining generally interference "in any manner" with the union's right to bargain collectively with the company in violation of the particular section (8 (5)), which had been previously violated. The comprehensive summary of the Labor Board decisions in *May Stores Co.* v. *Labor Board*, 326 U. S. 376, 389-391, cites numerous cases upholding Section 8 (1) orders issued both subsequent and prior to the *Express Co.* decision. The summary also shows at a glance that rarely does a court limit an injunction to specific acts or practices where there have been more than one type of violation of the same statutory provision.

Under the Sherman Act, this Court has upheld a decree enjoining defendants *inter alia* "from in any way conspiring or combining to violate the act" and prohibiting "*all agreements* between the subsidiary corporations or other stockholders in the future, *tending* to produce or bring about further violations of the act." This provision of the decree was approved "not as depriving [defendants] * * * of the power to make normal and lawful contracts or agreements, but as restraining them from, by *any device whatever*, recreating *directly or indirectly* the illegal combination which the decree dissolved" (italics supplied; *Standard Oil Co.* case, 221 U. S. at 79, 326 U. S. at 391).

are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act." *May Stores* decision, 326 U. S. at 391.

In the instant case, furthermore, three of the four violations found were not merely "similar or fairly related to" respondents' prior unlawful conduct (cf. *Labor Board* v. *Express Publishing Co.*, 312 U. S. at 435); they were exactly the same sort of illegal practices as had been charged at the original trial. Certainly the trial court's conclusion that the admitted violations required an injunction without the necessity for determining the lawfulness of the other practices charged should not render the injunction futile as to such other related practices as were in fact unlawful.

The injunction here involved is the standard form obtained by the Government in substantially all injunction suits brought under the Fair Labor Standards Act, and has been enforced in over a hundred contempt proceedings without challenge.[14] The Seventh Circuit Court of Appeals has rejected the contention that such an injunction "does not advise defendant as to what would constitute a violation," and has characterized the injunction as "clear and definite." *McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329, 331, certiorari denied, 332 U. S. 855. The decision below,

[14] A substantial number of cases are listed in note 20, p. 44, *infra*. See also *Walling* v. *Acosta*, 140 F. 2d 892 (C. C. A. 1).

though not holding this form of injunction invalid, appears to preclude its enforcement against conduct not specifically found to have been unlawful prior to the injunction's issuance even as against a defendant manifesting a proclivity toward general disobedience to the Act. Such a refusal to enforce the injunction as it stands would encourage recalcitrant or contentious employers to substitute one scheme of avoiding the statutory requirements for another, and to a large extent destroy the efficacy of the injunction remedy as a means of enforcing the Act.

This Court has repeatedly recognized the propriety of this type of injunction, which is not limited to the precise acts found to have been unlawful. *May Department Stores Co.* v. *Labor Board*, 326 U. S. 376, 389–391; *Local 167* v. *United States*, 291 U. S. 293, 299; cf. *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 51–52; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 77. As pointed out in the above cited decisions, in cases in which the sweeping nature of the violations warrants the issuance of a relatively broad injunction to prevent future violations—and the present case clearly comes within that class (see pp. 5–8, *supra*)—the reason for sustaining the broad injunction is to prevent a defendant from continuing his unlawful conduct in a related though somewhat different form. "Where the

proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct." See *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 186.

As this Court pointed out in the *Crescent Amusement* case, a general prohibition "is often the only practical remedy against continuation" of violations. *Ibid.* The instant case well illustrates that a decree limited to underpayments resulting from specific practices would be unreasonably restrictive and merely conducive to "disguised continuance" of the violations. Cf. *Southport Petroleum Co.* v. *Labor Board*, 315 U. S. 100, 106; *Regal Knitwear Co.* v. *Labor Board*, 324 U. S. 9, 14. Respondents here, for example, for some months after the Act first went into effect were paying some employees a weekly salary without regard to the overtime requirements of the Act. This was in violation of the Act under the decisions in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572 and *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88. If the injunction extended only to this particular practice, the employer could artificially break up the daily wage into so-called straight-time and overtime segments, or he could artificially compute an hourly rate under the so-called x-formula. These practices would likewise be in violation of the overtime provisions of the Act under the decisions in *Walling* v.

Helmerich & Payne, 323 U. S. 37; *Castle* v. *Walling*, 153 F. 2d 923 (C. C. A. 5); *Watkins* v. *Hudson Coal Co.*, 151 F. 2d 311 (C. C. A. 3), certiorari denied, 327 U. S. 777; and *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. 2d 359 (C. C. A. 10), certiorari denied, 320 U. S. 772.

Under the theory of the district court, however, the employer would not be in contempt of the initial decree because he had changed from one method of failure to pay overtime to another. If the district court enters a further injunction, as in this case, there would be nothing, under the reasoning of the courts below, to prevent the employer from again altering his method of compensation and adopting devices such as those held illegal in *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, or in *149 Madison Ave. Corp.* v. *Asselta*, 331 U. S. 199, or in *Bibb Mfg. Co.* v. *Walling*, 164 F. 2d 179 (C. C. A. 5). "Indeed it is not altogether fantastic to suppose that over a period of years [respondents] might in this way avoid all accountability for a continued series of such wrongs"—cf. *Labor Board* v. *Lowenstein & Sons, Inc.*, 121 F. 2d 673, 674 (C. C. A. 2). "Since the upshot of a new proceeding could be no more than a new injunction, the respondent would never be brought to account for what by hypothesis is contumacy of the existing injunction." *Ibid.* Thus the underlying reason for granting a broad injunction—to prevent repetition of the same

or similar statutory violations previously committed—is completely defeated if enforcement in a contempt action is to be limited to precisely the same practices and methods previously used.

To anticipate all possible fictitious overtime devices and to enjoin each of them specifically would be a virtual impossibility. This is a situation in which "it is hard to see how the decree could be made less general and more specific" and still provide "effective assurance that no such opportunity [for the unlawful result] will be available in the future." *United States* v. *Crescent Amusement Co.*, 323 U. S. at 188, 190. As this Court has stated, to be effective the decree "should be broad enough to prevent evasion" (*Local 167* v. *United States*, 291 U. S. at 299), and if a general prohibition places some burden on one who has shown "proclivity in the past" for violation, "it is a burden which those who have violated the Act must carry." *Ibid.*; *United States* v. *Crescent Amusement Co.*, *supra*.

The record at the original trial, as revealed in the summary of evidence in the Statement *supra*, pp. 4–12, shows that we are not dealing here with employers who have inadvertently committed isolated violations. We are dealing with employers who have openly and unequivocally manifested their antipathy to the Act and a proclivity in the past for seeking to avoid compliance. Since the effective

date of the Act, which is now more than ten years old these respondents have actively contested its application to their activities, have resolved every doubt against compliance, have resorted to a variety of devices which might afford them some excuse for noncompliance, and at one time even resorted to practices which amounted to deliberate falsification.[15] In short, the evidence before the court at the original trial revealed that respondents, far from being dependable risks for voluntary compliance, were not only contentious (see opinion of the court of appeals in 128 F. 2d at 399), but had a long record of studied efforts to avoid compliance. The record in the contempt proceeding demonstrates that these efforts have continued along a pattern substantially the same as that shown when the original decree was entered seven years ago.

Against this background of long continued and persistent violation, respondents, having been found in violation of specified provisions of the Act, cannot reasonably be heard to complain that "the injunction binds generally" as to violations of these provisions. Cf. *Local 167* v. *United States*, 291 U. S. 293 at 299. Nor is it reasonable to deal

[15] See Statement, *supra*, p. 6, describing the respondents practices prior to the original trial of concealing overtime hours by crediting the overtime hours of one employee to another employee and by separately paying for overtime with "extra labor vouchers."

with any of respondents "as one who has never violated the law at all." See *International Salt Co.* v. *United States*, 332 U. S. 392, 400. On the contrary it would make of the injunction an idle gesture if "all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention" *ibid.*

The reluctance of the courts below to enforce the injunction was apparently predicated on the assumption that this is a punitive proceeding "to inflict punishment" upon respondents (2nd R. 1010). Whatever basis there may be for confusion where the contempt action is mixed or not explicitly identified (cf. *United States* v. *United Mine Workers, supra*, with *Penfield Co.* v. *Securities & Exchange Comm.*, 330 U. S. 585), the action here is purely and simply a civil contempt, is explicitly so designated in the application for contempt (2nd R. 1), and seeks only purely civil remedial relief. The Administrator in this proceeding does not seek to punish or penalize respondents in any way—he seeks only the strictly civil relief that respondents be required to do what the decree and the law make it their duty to do. See *Penfield Co.* v. *Securities*

& Exchange Comm., 330 U. S. 585. Surely such a remedy is not so severe as to exclude its use even in doubtful cases. While there might be some basis for reluctance to punish or penalize respondents for erroneous interpretation of the decree where there is reasonable uncertainty as to the illegality of their practices, there should be no hesitancy about compelling respondents to comply with the decree and to restore any advantages they might have acquired through following their erroneous interpretations since the date of the decree. It imposes no undue "peril of contempt" [16] upon defendants to require them to carry the onus of uncertainty to this extent. "The onus thrown upon the Defendants, who have to comply with the terms of the injunction, is a necessary consequence of their own illegal act * * *." 54 Yale L. Journ. at 146, n. 22.[17]

Can it be considered unfair that an employer who has failed to pay the wages due under the Act with impunity for three years (the original decree was entered here August 29, 1941) is compelled to comply with the law from the date of the injunction decree? Is it unreasonable that an employer who gambles on evading the Act is

[16] See Note in 54 Yale Law Journal 141 at 146.

[17] Quoted from Lord Hatherley, L. C., in *Attorney-General v. Colney Hatch Lunatic Asylum*; L. R. 4 Ch. App. 146, 162 (1868).

not permitted to retain the benefits and advantages accruing from his resolving doubts against compliance, after he has had a trial and been enjoined from violating? Is it reasonable that an erroneous interpretation of their liabilities should be the basis of securing to respondents advantages over competitors who have correctly construed the law and have been complying with it since its effective date?

The appropriate answers to these questions seem clearly indicated in this Court's opinion in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, where, rejecting the employer's plea that he should not be subjected to the payment of liquidated damages "without opportunity to test the issues [of the applicability of the Act] before the courts," this Court said: "Perplexing as [employer's] problem may have been, the difficulty does not warrant shifting the burden to the employee" (*Id.*, at 582, 583). So in the instant case, whatever doubts respondents may have had do not warrant their retaining the benefits of their noncompliance at the expense of their employees, their competitors, and the public interest. The *Missel* ruling would seem, *a fortiori*, applicable here, since the relief now being sought would require respondents to pay only the basic wages, and not liquidated damages.

III

EFFECTIVE REMEDIAL RELIEF IN A CIVIL CONTEMPT ACTION FOR UNDERPAYMENTS IN VIOLATION OF THE INJUNCTION SHOULD INCLUDE AN ORDER FOR PURGING THE CONTEMPT BY RESTORATION OF SUCH UNDERPAYMENTS

While the appellate court below did not find it necessary to rule on the question of the Administrator's right to the remedy of restitution of wages during the period of contempt, this question will necessarily arise if the decision below is reversed on the other issues. Since the Fifth Circuit has already held that the Administrator has no authority to obtain such restitution in a civil contempt proceeding (*Walling* v. *Crane*, 158 F. 2d 80),[18] and the district court in this case merely followed that ruling, it is appropriate, and we think important, that the question be disposed of by this Court with the other issues in this case, rather than remanded to the Fifth Circuit.

In *Porter* v. *Warner Holding Co.*, 328 U. S. 395, this Court held that the power of the Administrator under the Emergency Price Control Act to bring proceedings in equity for the enforcement

[18] This case is now pending before the Court of Appeals for the second time on issues similar to those here presented. See 7 W. H. Cases 599, now pending before the Court of Appeals for the Fifth Circuit, No. 12,335.

of that statute included the power to compel restitution of overcharges to customers. The reasoning of this opinion seems applicable to the Fair Labor Standards Act as well. Cf. *Walling* v. *O'Grady*, 146 F. 2d 422 (C. C. A. 2), and *McComb* v. *Scerbo & Sons* (S. D. N. Y.) decided October 13, 1948, 8 W. H. Cases 304, under the Fair Labor Standards Act.[19] But whether or not in an original injunction proceeding the Administrator is entitled to seek restitution of wages previously

[19] The decision in *Porter* v. *Warner Holding Co.*, 328 U. S. 395, rested on the premise that the statutory injunction remedy invokes the full equity jurisdiction of the courts, including specifically jurisdiction to order restoration of "the status quo" and "the return of that which rightfully belongs" to the person harmed by the illegal conduct. See 328 U. S. at 398, 402. "Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. * * * Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." (*Id.* at 398–399.) "Such action is within the recognized power and within the highest tradition of a court of equity" (*id.* at 402).

Similarly, the statutory authority in Section 17 of the Fair Labor Standards Act "to restrain violations" invoked the same broad equitable jurisdiction. *Walling* v. *O'Grady*, 146 F. 2d 422 (C. C. A. 2), and *McComb* v. *Scerbo & Sons*, 8

withheld, we think it clear that after issuance of an injunction a court may and should order payment of amounts subsequently not paid employees in violation of the injunction. For this is merely to require compliance with the injunction which the statute authorizes, not to give the Administrator a different remedy under the statute. It has been the usual practice of the courts throughout the country to order restitution for violation of injunctions in civil contempt actions under the Fair Labor Standards Act, and no question as to

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W. H. Cases 304 (S. D. N. Y.). "We can see little difference between giving reparation to an employee for loss of wages as ancillary to injunctive relief * * * and giving back pay where an injunction for reinstatement has been violated [citing *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, and *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177]. In each case such reparation is necessary to restore the status quo interfered with by the unlawful conduct of the employer and in neither case is there a statutory mandate spelling out all the details of relief necessary for the purpose in hand." 146 F. 2d at 423. See also *Walling* v. *Miller*, 138 F. 2d 629 (C. C. A. 8), certiorari denied, 321 U. S. 785, *Fleming* v. *Warshawsky & Co.*, 123 F. 2d 622 (C. C. A. 7), and *Fleming* v. *Alderman*, 51 F. Supp. 800 (D. Conn.), which required restitution under consent decrees. In the *Alderman* case the district court refused to "view itself for purposes of the statutory proceedings as shorn of its general equitable jurisdiction," pointing out that "Section 17 authorizes injunctions to restrain 'violations' * * * it contains no language which limits its effect to violations with respect to wages earned thereafter" (at 801).

the propriety of this practice has been raised outside of the Fifth Circuit.[20]

This practice is not only supported *a fortiori* by the reasoning of the *Warner* decision, but would seem to be a necessary part of "the full remedial relief" to which the Government, like

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[20] For example, see *Fleming* v. *Knox*, 42 F. Supp. 948 (S. D. Ga.); *Jacobs* v. *W. B. Coppersmith & Sons*, 1 W. H. Cases 922 (E. D. N. C.); *Walling* v. *Jersey Footwear*, 6 W. H. Cases 552 (D. N. J., 1946); *McComb* v. *Frank Viliari d/b/a Mayaguez Embroidery Co.* (D. P. R.), Civil Action No. 2434, September 12, 1947; *Walling* v. *Empire Steamship Service Corp.* (S. D. N. Y.), Civil Action No. 21–168, May 16, 1947; *Walling* v. *W. H. Gale* (E. D. Va.), Civil Action No. 189, July 15, 1946; *Walling* v. *Charles Bihler* (D. N. J.), Civil Action No. 1276, March 28, 1946; *Walling* v. *Sam Schweitzer et al.* (D. P. R.), Civil Action No. 527, March 6, 1946; *Walling* v. *G. & M. Cloak Co.* (E. D. N. Y.), Civil Action No. 26–13, August 6, 1945; *Fleming* v. *G. A. Mercurio Co.* (D. R. I.), Civil Action No. 397, February 12, 1945; *Fleming* v. *Ruth Merzon* (S. D. N. Y.), Civil Action No. 10–77, November 15, 1944; *Fleming* v. *Metro Sportswear, Inc.* (S. D. N. Y.), Civil Action No. 15–143, February 24, 1944; *Fleming* v. *Goldsmith Co.* (D. P. R.), Civil Action No. 686, August 14, 1943; *Walling* v. *Malcolm Kenneth Co.* (D. Mass.), Civil Action No. 1217, March 5, 1943; *Fleming* v. *Daniel Nadal* (D. P. R.), Civil Action No. 527, November 14, 1941; *Fleming* v. *McAdoo* (W. D. Tenn.), Civil Action No. 76, January 20, 1941; *Andres* v. *Sports-Wear Hosiery Mills, Inc.* (E. D. Pa.), Civil Action No. 217, May 25, 1940; see also *Walling* v. *M. Glasgall Silk Co. & Morris Glasgall* (D. N. J.), Civil Action No. 1256, April 14, 1947, where upon proof of payment of restitution plus liquidated damages, the court dismissed the contempt action. Although these cases involved consent decrees, the power of the Court to order restitution for violation occurring after entry of the decree would be the same whether the decree was entered by consent or after contest.

other suitors, is entitled to compel compliance with a judgment in a civil contempt action. *Penfield Co.* v. *Securities & Exchange Comm.*, 330 U. S. 585 at 592; *United States* v. *United Mine Workers*, 330 U. S. 258; *Leman* v. *Krentler-Arnold Co.*, 284 U. S. 448; *Union Tool Co.* v. *Wilson*, 259 U. S. 107; see also *Maggio* v. *Zeitz*, 333 U. S. 56 at 67–68;[21] *Parker* v. *United States*, 153 F. 2d 66 (C. C. A. 1); cf. *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 327. Such relief would necessarily include the payment of the wages which the judgment had made it respondents' duty to pay. See *Union Tool Co.* v. *Wilson*, *supra* and *Leman* v. *Krentler-Arnold Co.*, *supra*. Any relief less than that would put a premium on violation. "Otherwise, there would be reward from * * * [violation] through retention of its fruits." See *United States* v. *Paramount Pictures*, 334 U. S. 131, 171. See also *Schine Chain Theatres* v. *United States*, 334 U. S. 110: "To require divestiture of * * * [benefits] unlawfully ac-

[21] While the Court held in the *Maggio* case that the coercive sanction should not be imposed where it appears that the bankrupt is presently unable to comply with the turnover order, there has been no suggestion in the instant case, as pointed out, *infra*, pp. 53–54, that the contemnors will be unable to comply with the wage requirements of the injunction. See also *Parker* v. *United States*, 153 F. 2d 66, 70 (C. C. A. 1), recognizing that a coercive sanction may not be enforced to the extent of confining a contemnor who "shows his utter inability" to pay the compensatory fine, or to comply with the court's orders.

quired is not to add to the penalties that Congress has provided * * *. Like restitution it merely deprives a defendant of the gains from his wrongful conduct" (at p. 128).

The decision in *Parker* v. *United States, supra,* holding that denial of the remedy of restitution would be an abuse of discretion, seems equally applicable to the closely parallel situation here. In holding that the Government, upon proof of underpayments in violation of an injunction requiring compliance with a Federal milk marketing order, was "entitled as of right" to the imposition of a compensatory fine equal to the underpayments, the Court of Appeals for the First Circuit said:

> If complainant makes a showing that respondent has disobeyed a decree in complainant's favor and that damages have resulted to complainant thereby, complainant is entitled *as of right* to an order in civil contempt imposing a compensatory fine. *Union Tool Co.* v. *Wilson,* 1922, 259 U. S. 107, 42 S. Ct. 427, 66 L. Ed. 848; *Enoch Morgan's Sons Co.* v. *Gibson,* 8 Cir., 1903, 122 F. 420, 423; *L. E. Waterman Co.* v. *Standard Drug Co.,* 6 Cir., 1913, 202 F. 167. *The court has no discretion to withhold the appropriate remedial order.* In this respect the situation is unlike that of criminal contempt where the court in its discretion may withhold punishment for the past act of disobedience. An order impos-

> ing a compensatory fine in a civil contempt proceeding is thus somewhat analogous to a tort judgment for damages caused by wrongful conduct [Italics supplied].

The analogy to the instant case is particularly noteworthy since the "compensatory fine" ordered in the *Parker* case was not to be retained by the Administrator but was to be turned over by him to various milk dealers and producers in order to effectuate the statutory equalization scheme. See *Green Valley Creamery, Inc.* v. *United States*, 108 F. 2d 342, 344 (C. C. A. 1). Further, the compensatory fine levied in the *Parker* case not only included underpayments due when the injunction was issued but also underpayments due subsequent to its issuance. See *Parker* v. *United States*, 126 F. 2d 370, 374, 380. This is significant in view of the Fifth Circuit's assumption that restitution could not be ordered "in unascertainable amounts" to persons not named in the decree. See *Crane* opinion, 158 F. 2d at 84. But compare *Texas & N. O. R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 33 F. 2d 13, 16 (C. C. A. 5), affirmed, 281 U. S. 548, where the Fifth Circuit itself upheld an order compelling the contemnor to restore back wages to railroad employees wrongfully discharged in violation of an injunction although the injunction did not specify "any particular amounts due any individual" or "designate particular employees * * * and the amounts

to be paid them" (see district court opinion in *Crane* case, after remand, 7 W. H. Cases 599–600). Obviously the absence from the decree of the names of the employees and the specific amounts due them is no reason for refusing restitution. "The decree does not appear too indefinite to support such an order, for, exactness of amounts and employees' names is impossible in any decree which operates in *futuro.*" See Note (1947), 60 Harv. L. Rev. 470, 471.

This Court's decisions confirm the ruling of the *Parker* case that the discretion of the court in the event it finds civil contempt is a discretion as to what measure will effectively compel compliance, and not a discretion to choose some lesser relief.[22] See *Penfield, United Mine Workers* and *Union Tool* decisions *supra.* While "there may be occasion for the exercise of judicial discretion * * * the order to be entered in such a proceeding is not exclusively or necessarily a discretionary one. * * * Moreover, legal discretion in such a case does not extend to a refusal to apply well-settled principles of law to a conceded state of facts." *Union Tool Co.* v. *Wilson,* 259 U. S. 107 at 112. In other words, the court is not free

[22] See the review of the *Penfield* case in 59 Harvard L. Rev. 1311 (1946), pointing out that the case limits "the discretionary powers of the trial court in holding that where the order which is disobeyed is in aid of a statute representing a strong public policy, a mere penalty may be inadequate."

to refuse the relief necessary to effect compliance with the injunction.

The suggestion in the opinion below that an order for payment of unpaid wages to purge the contempt might conflict with the employees' right to recover under Section 16 (b) of the Act (2nd R. 1125) overlooks the purposes and supplementary character of these two distinct remedies. Although employees have a private right to their wages and to be made whole by way of liquidated damages for underpayments, the Administrator has an independent interest—on behalf of the public—in compelling the payment of the statutory wages. Congress, apparently recognizing that the public interest and the interests of complying competitors could not be adequately protected simply by giving individual employees the right to sue, provided the supplementary remedy of injunction. The purpose of the injunctive remedy obviously is to secure, short of criminal prosecution, some more uniform and more reliable enforcement than could be afforded by sporadic individual employee suits.

As Congress evidently anticipated, the employee remedy, although important as an ancillary aid in enforcing the Act and in enabling individual employees to secure redress, is inadequate to secure the uniform enforcement which is essential for this type of legislation.

The order for payment of unpaid wages as a purging of contempt thus serves a purpose not in conflict with, but supplementary to, the employee's right to sue for his wages. Such a remedy as a means of enforcing an injunction can more effectively accomplish the broader public purposes, because it is not dependent upon the whim or comparative initiative or fears of individual employees. "The Administrator acts in the public interest—the purchaser in his own. The remedies are not irreconcilable. There are undoubtedly many instances where the relationship of buyer and seller is such that the buyer is deterred from vindicating his own and therefore also the public right." See *Bowles* v. *Skaggs*, 151 F. 2d 817, 821 (C. C. A. 6).

Congress was well aware that employees might be reluctant to assert their rights and that in some instances they might be intimidated. To limit the means of requiring the employer to pay the statutory amounts strictly to individual employee suits is to exclude resort to this most effective remedy in cases where it is most needed, that is, where employees are too weak, too ignorant or too intimidated to assert their rights. Even where employees feel free to bring suit, it is well known that the successful prosecution of such suits is beset with obstacles that would discourage even litigants not subject to the risks of antagonizing their employer. See 43 Columbia L. Rev., p. 355, for a comprehensive dis-

cussion of the difficulties of proof in employee suits under Section 16 (b).

Thus, it is evident as a practical matter that the employees' remedy under Section 16 (b) cannot take the place of, and affords no reasonable ground for denying the usual equitable relief incident to the enforcement of an injunction. As this Court said in *Porter* v. *Warner Holding Co.*, 328 U. S. 395, when the Administrator seeks restitution he is simply asking "the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity" and "is plainly unaffected by the provisions of Section 205 (e)," giving an aggrieved purchaser or tenant the right to sue for damages on his own behalf. There was no indication, continued the Court, that the private right to sue "was intended to whittle down the equitable jurisdiction * * * so as to preclude a suit for restitution." 328 U. S. at 402, n. 5.

The purging of contempt by requiring payment of the amounts unlawfully withheld also serves the public interest in having the statutory wage requirements uniformly enforced, so that the employer whose employees may be lax in asserting their claims may not thereby secure an unfair advantage over competitors whose employees in-

sist upon their rights. The hit or miss prosecution of employee suits is obviously inadequate to enforce the public policy of the Act that "interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions." *United States* v. *Darby*, 312 U. S. 100, 115. To carry out this public responsibility Congress has provided the injunctive remedy, which implies the right of the Administrator on behalf of the Government "to benefit from orders entered in its behalf" through "the civil remedies enjoyed by other litigants" (see *United Mine Workers* opinion, 330 U. S. at 302). With respect to a similar statutory injunction remedy, this Court has said that its comprehensiveness "is not to be denied or limited" by implication. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." See *Porter* v. *Warner Holding Co.*, 328 U. S. at 398. It therefore takes an unreasonably restrictive view of the injunctive remedy to exclude "the most appropriate method of coercing the employer's compliance, which is clearly to measure the fine by the [unpaid] wages." See 60 Harvard L. Rev. 470, 471 (1947).

Equally untenable is the suggestion (see the Fifth Circuit's opinion in the *Crane* case) that a

reparation order might result in "imprisonment * * *. as the means for the collection of a debt" (158 F. 2d 80, 85). It is well settled that contempt proceedings may be employed for coercing payment of alimony (see *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 442; *Maggio* v. *Zeitz*, 333 U. S. at 74, fn. 7), restitution of back pay under the National Labor Relations Act (cf. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194), or the refund of overcharges under Section 205 (e) of the Emergency Price Control Act (see *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 396). In each of these situations, fine and imprisonment are potential means for "collection of a debt." See also *Fox* v. *Capital Co.*, 299 U. S. 105, 108. Similarly in the *Parker* case (see *supra*, n. 20, p. 45), the court fully appreciated the fact that contempt might have subjected defendant to "imprisonment * * * as the means for the collection of the debt." The potentiality for "imprisonment for debt" in these cases does not mean that a person financially unable to pay will be imprisoned for debt. Both the *Maggio* and the *Parker* cases, *supra*, make it clear that there are protective limitations which assure that this remedy will be relied upon only to the extent that it can actually serve the civil function of effecting compliance.

It has not been suggested that the contemnors in the instant case will be financially unable to pay the wages in question, and there is no threat

of imprisonment for debt unless they refuse to comply with the court's order in contempt. In other words, contemnors "carry the keys of their prison in their own pockets." *In re Nevitt*, 117 Fed. 448, 461 (C. C. A. 8), cited with approval in the *Penfield* case, 330 U.S. at 590 and in *Maggio* v. *Zeitz*, 333 U. S. 56, 67–68. The potentiality of imprisonment for debt in this sense exists in every civil contempt where a coercive fine is imposed, but any imprisonment imposed would be not for debt but for refusal of contemnor to comply with the court's order. Unlike a criminal contempt proceeding, the purpose of the present action is not to punish but to coerce defendants into doing that which the decree and the law make it their duty to do.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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